BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, did not render an opinion. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit appears on pages 151-154 of the Transcript of the Record and is reported in 115 Fed. (2) 713. The opinion of the Circuit Court of Appeals for the Seventh Circuit on petition for rehearing appears on pages 156-158 of the Transcript of the Record and is reported in 115 Fed. (2) 713, at pages 715-716.

ERRORS TO BE URGED.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in reversing the judgment of the District Court for the Northern District of Illinois, Eastern Division, which judgment was based upon the verdict of a jury.

2. The United States Circuit Court of Appeals for the Seventh Circuit erred in remanding the case to the District Court for the Northern District of Illinois, Eastern Division, with instructions to "dismiss on the merits."

STATEMENT OF THE CASE.

The respondent, S. S. Kresge Company, maintained a retail store at the corner of 63rd and Halsted Street in the City of Chicago. The store is a large one and con-

sists of two sales floors, the basement, the first or main floor and the stockroom on the second floor. Leading from the main first floor to the basement were stairs, the steps of which were made of smooth marble (R. 7, 10, 19, 31, 61, 66, 87) and had no covering or mat of any kind on them. (R. 9, 16, 31, 60.) The stairs were divided into two parts with brass rails running down the center as shown in Respondent's Exhibits 1, 2 and 3. (R. 89.) There were also hand rails on either side for persons going up or down the stairs. The store is large, and during the noon hour of a day such as the day on which the petitioner was injured, February 21, 1931, an average of two thousand persons came in and went out of the store. (R. 104.)

The petitioner fell about 11:45 a. m. (R. 6, 29, 39.) As the petitioner started to descend the stairway, she had hold of the banister rail with her right hand, and as she got down two or three stairs she noticed that the stairs were very slippery and she held onto the banister and proceeded down. (R. 39.) When she got down four or five stairs and just as she was stepping on one of the stairs her foot slipped out from under her, and she was unable to brace herself and slipped as a result of the wet and melted snow on the stairs and the slippery condition of same, causing her to slide down the stairway to the landing below. (R. 39-40.) At the time of the fall the steps were slippery, sloppy, slushy, very wet, and they seemed very waxy and sort of greasy like. (R. 9, 11, 30, 50, 52, 60.) The entire stairway of twenty or twenty-two steps was in the same condition as described. (R. 32, 60.) One of petitioner's witnesses who went in the store between 10:30 and 11 a. m. (R. 24) found the steps at that time wet, slushy and very slippery. (R. 25.) In fact, the stairs were then so slippery that this witness slipped at about the second step (R. 25, 27) as she was going down. Another of petitioner's witnesses went down the steps

about 11:15 a. m. (R. 14) and found them muddy, slushy and very slippery, as though they had a high polish. (R. 15.) Two witnesses happened to be at the foot of the stairs for about one-half hour before the petitioner fell. (R. 7, 59.) One of these witnesses, Hazel Brown, went down the steps about 11 a. m. (R. 60) and found the stairs at that time awfully slippery, waxy and a lot of mud and water on them. (R. 60, 66.) As she went down the stairs, she slipped because of the condition described. (R. 60.) This witness further testified that she couldn't tell whether the steps were slippery until she stepped on them. (R. 66.) When Hazel Brown returned to the foot of the stairway and met her friend, Mrs. Frayne, one-half hour before the petitioner fell, the steps were still in the same condition as they were when she descended. (R. 60, 66.) During the one-half hour prior to the fall that Mrs. Brown and her friend were at the foot of the stairway, nobody cleaned or mopped the steps (R. 9, 60), although Mrs. Frayne saw two other people slip on the steps before the occurrence in question. (R. 13.) This testimony with reference to respondent's failure to clean the steps was contradicted by respondent's employee, Jesse Grigsby, who testified for respondent that he mopped the stairway about fifteen minutes before the petitioner fell (R. 96) and between the hours of 11 and 11:30 a. m. (R. 99.) This witness also testified that he looked at the stairs at 11:10 or 11:15 a. m. at the request of Mr. Landis, his superior, and didn't do anything because the stairs were in good condition. (R. 99.) Mr. Landis, however, admitted on cross-examination that when he saw the steps at about ten minutes of eleven a. m., they were in such condition that he knew they needed mopping. (R. 85.) These two witnesses of respondent further contradicted each other in that Fred Landis, respondent's assistant manager, testified that he first saw the porter, Mr.

Grigsby, at 8 a. m. on the morning in question, washing the 63rd Street door, and at that time gave him instructions to keep the stairs and floor clean. (R. 83.) Grigsby, however, testified that he generally started work about 11 a. m. (R. 95) and that on the morning in question, he saw Landis at about 11:15 or 11:10 a. m. (R. 98, 99.) At the time petitioner fell, the steps were slushy, wet and muddy with dirty, melted snow on them and waxy, slippery and sort of greasy. (R. 30, 40, 52.) The stairway in question was inside the store proper and about twelve (12) feet from the nearest street entrance. (R. 77.)

With reference to petitioner's injuries, the record shows that when petitioner slid down the stairs, her head struck the first or second step from the bottom with a crash that made a noise like a jar bursting (R. 30, 59), and she was knocked unconscious (R. 8, 30, 39, 60) and remained in that condition a couple of minutes. (R. 60.) She was picked up by some man immediately after the fall and carried to the elevator (R. 8, 30, 40, 59), not regaining consciousness until after she was in the elevator. (R. 40.) When Dr. Coopersmith examined petitioner the day after the fall, he found a swelling of the back of the head about the size of a half dollar, the muscle extending from back of the ear, neck and down to the collar bone was swollen and bruised, there was a swelling at the tail bone of the spine, and bruises and swelling of the chest. (R. 54.) After the injury, she vomited liquids and food about three or four times a day. (R. 55.) Petitioner suffered continually with her head. She had no strength in her back and was very nervous. She suffered from headaches several times a week, which would sometimes last two or three days. (R. 44-45.) In December, 1939, Dr. Coopersmith advised petitioner to quit work because of her nervousness and loss of strength, which in the treating

physician's opinion was due to the fall. (R. 56.) At the time of the trial, nearly one year after the fall, petitioner was still not working and still under the physician's care (R. 44), seeing him about twice a month for examination and treatment. (R. 56.) Dr. Snitman, who testified as an expert, and whose qualifications were admitted by respondent (R. 67), stated that her condition of health, as above described, would be permanent. (R. 71.) With the exception of being off two or three days (R. 46), petitioner had worked steadily for four years prior to the fall in question and was never troubled with headaches or extreme nervousness before this injury. (R. 45.) No testimony was offered by respondent refuting any of the medical features of the case.

ARGUMENT.

I.

The order of the Circuit Court of Appeals to dismiss on the merits was contrary to the Seventh Amendment of the Constitution of the United States.

The order of the Circuit Court of Appeals to dismiss on the merits was directly contrary to the case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914 D, 1029, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 57 S. Ct. 809, 81 L. Ed. 1177. In the *Slocum* case the Supreme Court of the United States held that, by virtue of the Seventh Amendment of the Constitution of the United States, a Court of Appeals may not order the dismissal of a cause which was tried by a jury, but it may only remand for a new trial. The same was held in the *Aetna Ins. Co.* case. The United States Court of Appeals for the Seventh Circuit entered an order directing the dismissal of the petitioner's cause on the merits without granting her a new trial, thus depriving her of a trial by jury as guaranteed by the Seventh Amendment of the United States Constitution.

II.

Rule 50 (b) of the Federal Rules of Civil Procedure may not be interpreted to override the Seventh Amendment of the Constitution of the United States.

The cases of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, were called to the attention of the United States

Circuit Court of Appeals for the Seventh Circuit by your petitioner in her petition for rehearing which she filed in the Circuit Court of Appeals. That Court, however, relied on Rule 50 (b) of the Federal Rules of Civil Procedure which provides: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion". The Circuit Court of Appeals said in its opinion (at 115 Fed. (2) page 716): "Without the new Rule, this would undoubtedly bring the case within the purview of the Slocum case, and we would be required to remand for new trial." We submit to this Honorable Court that if Rule 50 (b) of the Federal Rules of Civil Procedure is to be interpreted so as to give a Federal reviewing court the power to dismiss a cause instead of remanding it for a new trial—a power which it did not have at common law—then this rule would, in effect, override the Seventh Amendment to the Constitution of the United States. This, no doubt, was not the intention of the Supreme Court of the United States in framing the Federal Rules of Civil Procedure. Furthermore, such an interpretation would give the Federal reviewing court authority which it did not have prior to the passage of the Rules, and it is quite evident that it was not the intention of the Supreme Court of the United States to extend the jurisdiction of the Circuit Courts of Appeal by the passage of the Federal Rules of Civil Procedure.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit relies on the case of *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636. It is to be noted that the *Redman* case is dissimilar to the case at bar. In the *Redman*

case the ruling on the motion for a directed verdict had been expressly reserved by the court until after verdict when the court ruled on the sufficiency of the evidence, whereas in the case at bar no such reservation was made and the court unconditionally denied the motion of the defendant for directed verdict before the case was submitted to the jury. If Rule 50 (b) of the Federal Rules of Civil Procedure is to be interpreted to grant the Circuit Courts of Appeals the power to remand without granting a new trial, then that rule would in effect change the common law method of trial by jury and thus override the Seventh Amendment of the Constitution of the United States. Such interpretation would be contrary to the meaning that was intended for the rule and would make the rule unconstitutional.

III.

The Circuit Court of Appeals for Seventh Circuit interpreted the local law of Illinois contrary to the decisions of the Supreme Court of Illinois.

The case at bar was tried in the District Court of the United States for the Northern District of Illinois, Eastern Division. It was, therefore, the duty of the Circuit Court of Appeals for the Seventh Circuit, in accordance with the holding in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, to follow the law of Illinois as promulgated by the Supreme Court of Illinois, which is the highest court of that State.

The law of negligence in the maintenance of stairways was declared by the Supreme Court of Illinois in the case of *I. C. Railroad Co.* v. *Keegan,* 210 Ill. 150, wherein the Court, at page 156, said:

"* * * It was the duty of the appellant to use reason-

able care to keep the said stairway in a reasonably safe condition, and in view of the evidence heretofore referred to, the questions whether it used such reasonable care and what was the condition of the steps at the time of the injury were questions of fact for the jury. The fact that the appellant had men present whose duty it was to remove the slush, snow and ice from the steps would not excuse it for a failure to keep the stairway in a reasonable safe condition for use by persons seeking to take passage upon its trains, if such employees failed and neglected to use due diligence to remove the slush, snow and ice deposited upon said steps. The trial court did not err in declining to take the case from the jury, but properly left to them the question whether the appellant used proper diligence to keep said steps in a reasonably safe condition under the circumstances as disclosed by the evidence."

As to the law of contributory negligence, the Supreme Court of Illinois, in the comparatively recent case of *Blumb* v. *Getz,* 366 Ill. 273, at page 277, said:

> "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case. As was stated in *Thomas* v. *Buchanan,* 357 Ill. 270: 'The question of due care on the part of the plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased.' "

The Circuit Court of Appeals for the Seventh Circuit followed the case of *Murray* v. *Bedell Co.,* 256 Ill. App. 247, which was decided by one of the four Appellate Courts of Illinois. This Appellate Court decision is in conflict with the decisions of the Supreme Court of Illinois. We call this

Honorable Court's attention to the fact that the four Appellate Courts of Illinois are tribunals of intermediary appellate jurisdiction and that the Supreme Court of Illinois is the highest court of last resort in the State. Under the decision of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, it was the duty of the United States Circuit Court of Appeals for the Seventh Circuit to follow the law of the Supreme Court of Illinois and not of the Appellate Courts of Illinois.

Furthermore, the Circuit Court of Appeals for the Seventh Circuit not only failed to follow the common law as announced by the Supreme Court of Illinois, but it also failed to follow the law of negligence and contributory negligence as announced by the Supreme Court of the United States. This Honorable Court, in *The Richmond & Danville R. R. Co.* v. *Powers,* 149 U. S. 43, 45, said:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

This Court said in *Kreigh* v. *Westinghouse, C. K. & Co.,* 214 U. S. 249, 258:

> "Questions of negligence do not become questions of law to be decided by the court, except 'where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish'. *Gardner* v. *Michigan C. R. Co.,* 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140."

This Court said in *Dimick* v. *Schiedt*, 293 U. S. 474, 486:

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

CONCLUSION.

It is respectfully submitted that the errors of the United States Circuit Court of Appeals for the Seventh Circuit above discussed are of such importance as to call for review and determination by this Honorable Court.

Respectfully submitted,

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